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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DONALD WOLFF,

Plaintiff and Appellant,

v.

NANDITTA BANERJEE,

Defendant and Respondent.

A147309

(Contra Costa County  
Super. Ct. No. MSD 010-6091)

Donald Wolff appeals from the trial court's discharge of an order to show cause after a hearing for contempt. He claims the court erred because respondent Nanditta Banerjee allegedly violated an automatic restraining order and committed fraud and other wrongdoing by selling the family home. We will affirm the trial court's order.

**I. FACTS AND PROCEDURAL HISTORY**

Wolff and Banerjee married in January 1999 and separated in September or October 2010. Wolff filed a complaint for dissolution of the marriage in December 2010, and in that same month Banerjee was served with the complaint and summons, which included the automatic temporary restraining orders (ATROs) required by Family Code section 2040. One of the ATROs prohibited each party from transferring or disposing of property without a court order or written consent of the other party. (Fam. Code, § 2040, subd. (a).)

**A. The Madigan Property**

Included on Wolff's list of community assets was the family home located on Madigan Avenue (Madigan Property). Wolff and Banerjee held title to the Madigan

Property as joint tenants, and both were signatories on a mortgage that the property secured.

In January 2011, Wolff transferred ownership of the Madigan Property to Banerjee by a quit claim deed as an early property settlement; he contends, however, that the transfer of his interest to Banerjee did not reflect any agreement that she could unilaterally transfer or dispose of the property.

Purportedly unbeknownst to Wolff, Banerjee stopped making the mortgage payments on the Madigan Property in May 2011. In approximately September 2011, Banerjee transferred the property without Wolff's knowledge to a "trustee," who sold it in March 2012. As would later be clarified at the order to show cause hearing, the failure of Banerjee (and Wolff) to make payments on the mortgage resulted in the lender foreclosing on the property, which led to a short sale, which extinguished the mortgage. Wolff learned of the sale when he received a statement from the trustee in September 2012.

#### B. Property Division Trial

A trial on reserved issues—including the division of property and child support—was held on two days in August and October 2014. Wolff raised the issue of the sale of the Madigan Property; the court (Judge Fannin) did not include the Madigan Property as a community asset and divided the properties that remained. A judgment on the reserved issues was entered in November 2014.

Wolff appealed the November 2014 judgment in July 2015 (appeal number A144094). His opening brief not only raised matters pertaining to the division of the community property, but also contended that the trial court "refused to uphold ATROs when [Banerjee] sold the family residence." Indeed, the discussion of this issue in the opening brief in appeal number A144094 is substantially the same as it is here. We affirmed the November 2014 judgment in March 2016.<sup>1</sup>

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<sup>1</sup> The affirmance of the judgment distributing the assets may render moot some aspects of Wolff's present challenge to the ruling that Banerjee did not violate the ATROs by the sale of the Madigan Property. Because Wolff is seeking recovery beyond

### C. Order to Show Cause

Meanwhile, in August 2015 on Wolff's application, the trial court issued an order for Banerjee to show cause concerning the transfer and sale of the Madigan Property without Wolff's consent and in purported violation of the ATROs, as well as her alleged refusal to comply with Wolff's subpoena demanding production of documents concerning the sale (OSC).

A hearing on the OSC took place on December 4, 2015. Wolff appeared in pro per, and Banerjee appeared with counsel. The court stated that, on the face of the OSC application, there was no violation of the ATROs for essentially three reasons: (1) since title to the Madigan Property was solely in the name of Banerjee, selling the property would not violate the ATROs; (2) both Wolff and Banerjee were on the mortgage and obligated to make the mortgage payments, and therefore both parties were responsible for allowing the mortgage to go into default and the property to be sold in a short sale; and (3) the property was "upside down"—that is, the house was worth less than the mortgage balance by about \$79,000—and the sale of the property extinguished the mortgage. Since Banerjee did not obtain any equity from the sale, Wolff was not damaged by the transaction even if it constituted a violation of the ATROs. The court also noted that Banerjee was not obligated to wait until the market improved in the hope that she and Wolff could share a profit. In addition, the court observed that there was no problem concerning production of documents, because Wolff could have obtained the necessary information himself, as one of the signatories on the mortgage. The court discharged the OSC.

This appeal followed.

## II. DISCUSSION

Family Code section 2040 provides for standard restraining orders to be included in a summons issued in a proceeding for dissolution of marriage. Subdivision (a) of the

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the division of the marital property, however, we will proceed to decide Wolff's present appeal on the merits.

statute reads: “In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order: [¶] . . . (2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life . . . .”

The essential question is whether Banerjee “transferr[ed]” or “dispos[ed]” of the Madigan Property within the meaning of Family Code section 2040. The record indicates that, because of the parties’ failure to pay the mortgage, the loan went into default, the lender foreclosed on the property, and the property was sold at a short sale. While Wolff debates who should have made the mortgage payments, and urges that other steps such as renting the property could have avoided the foreclosure, the undisputed fact is that both parties were legally responsible for making the payments.<sup>2</sup> And while it was allegedly Banerjee who signed the Madigan Property over to the trustee who sold the property, that was because only Banerjee was on the title at the time. Wolff provides no legal authority for the proposition that the short sale of real property, after it has been foreclosed upon by a bank due to the parties’ default on their joint mortgage and title has been transferred by one spouse to the other, constitutes a violation of the ATROs by either spouse.

Furthermore, since the sale of the Madigan Property extinguished the mortgage—a community debt—it benefitted both parties equally. Banerjee did not receive any proceeds from the sale that she would have to share with Wolff, and Wolff does not establish any damages as a result of Banerjee allowing the property to be sold.

Wolff argues that if Banerjee had kept up with the loan and avoided the short sale (and thus avoided the negative effect on his credit), she could have held the property until

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<sup>2</sup> As the trial court observed: “Well, there’s a question about whether or not she did [dispose of an asset], because it was a situation where the house went to short sale. It was foreclosed on by the bank. [¶] She didn’t list it with Coldwell Banker and put it up for sale and run away with the money. [¶] It was a short sale, because the mortgage payments weren’t made. [¶] And there’s no order of the court ordering her to make those mortgage payments. You’re both on the hook for it.”

it appreciated in value and they could have shared the equity. As the trial court noted, however, the point is that both Wolff and Banerjee were obligated on the mortgage and therefore legally responsible for the default and the resulting short sale. In short, Wolff was a joint legal cause of any damage he allegedly suffered.<sup>3</sup>

Wolff complains that the trial court did not admit evidence or testimony. The record shows, however, that the court did not proceed with a full evidentiary hearing because, on the face of the petition and assuming the truth of the facts Wolff alleged, there could be no violation of the ATROs as a matter of law. For reasons we have already explained, the court did not err in this regard.

Wolff contends that the judge who decided the matter (Judge Mills) was “unprepared.” The record shows the opposite is true: he was readily familiar with the basis for the OSC and had plainly analyzed the issues by the time of the hearing.

Wolff next notes that Judge Mills admitted he was not a family law judge. But the judge made this statement in the course of explaining why he was not ruling on another “substantial filing relating to innumerable other issues related to the underlying divorce, itself,” which would be heard in the Family Law Department. Judge Mills further explained that he was hearing the OSC because family law OSC and contempt actions were heard in the criminal law department. In short, the record demonstrates that the OSC matter in this case was heard in the right department, by the correct judge.

Wolff also complains that Judge Mills was not a family law expert and allowed another judge—Judge Fannin—to decide the case for him. Not so. Judge Mills did indicate that he was “not an expert in family law,” and after discussing the issues with the parties, he “took ten minutes and went and sat down with a former family law judge, who is still on the bench, who has an expertise in this area, and asked if [he] was missing something.” Judge Mills recounted: “And that judge’s assessment was the same as mine.

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<sup>3</sup> Furthermore, when Wolff transferred all of his title in the Madigan Property to Banerjee, he was no longer record owner of the property securing the mortgage. Wolff does not establish that the lender would have continued the mortgage, which was in both of their names, under these circumstances anyway.

That, if the quitclaim deed was signed over to Miss Banerjee, there couldn't be a violation of the Restraining Order. [¶] That both of them were on the hook to make the payments, since they're both on the mortgage. [¶] And the fact that he didn't, either, doesn't mean that's a violation of the Restraining Order as to her. [¶] And because there's no equity in the home at the time of the sale, there's no damages. [¶] That judge couldn't see any violation, either, based on this petition."

Far from allowing another judge to dictate the decision, Judge Mills double-checked the soundness of his own analysis with a colleague versed in the field: this does not indicate error, but a laudable effort to assure a correct result. Indeed, Judge Mills explicitly stated on the record: "what the other judge's view is ultimately doesn't make any difference, in the sense that, I have the final say because it's my case." Wolff's additional accusation—that the judge with whom Judge Mills discussed the matter was Judge Fannin, and that Judge Fannin was biased against him—is speculative and not supported by the record.

We have reviewed and considered all of the arguments set forth in Wolff's appellate brief. He fails to establish error.

### III. DISPOSITION

The order is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.

(A147309)